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Office Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 95

VERON ATCHLEY, also known as JACK ATCHLEY,

Petitioner,

vs.

CALIFORNIA.

BRIEF OF PETITIONER

ROSALIE S. ASHER
County Court House
Sacramento, California
Attorney for Petitioner

J. R. KING, JR.
Suite 121, Oroville Inn
Oroville, California
Of Counsel

INDEX

SUBJECT INDEX

Page

BRIEF OF PETITIONER:

Table of Authorities Cited ii

Reference to Reported Opinions 1

Jurisdictional Statement 1

Constitutional and Statutory Provisions Involved 2

Questions Presented for Review 4

Statement of the Case 5

ARGUMENT:

A. The Finding by the State Court That the Confession Was Voluntary Is Not Binding Here, and This Court Must Make Its Own Determination From the Uncontroverted Facts in the Record 10

B. Petitioner Was Convicted in Contravention of His Right to Due Process of Law by the Use of a Confession Which Was Not the Product of His Free Will 11

C. Whether the Statements Be a Confession or Mere Admissions, Defendant's Constitutional Rights Have Been Violated and the Conviction Cannot Stand 17

D. Due Process Is Denied When a Conviction Is Secured by Means of an Involuntary Confession Regardless of Its Truth or Falsity and Regardless of Other Corroborative Testimony 18

Page

E. Defendant's Constitutional Rights Were Further Violated Where, in Addition to the Use of a Coerced Confession, His Requests for Counsel Have Been Denied 19

CONCLUSION 22

TABLE OF AUTHORITIES CITED

CASES:

Ashcraft v. *Tennessee*, 322 U.S. 143, 88 L. Ed. 1193, 64 S. Ct. 921 12

Blackburn v. *Alabama*, 361 U.S. 199, 4 L. Ed. 2nd 242, 80 S. Ct. 274 19

Bram v. *United States*, 168 U.S. 532, 42 L. Ed. 568, 18 S. Ct. 183 17

Brown v. *Allen*, 344 U.S. 443, 97 L. Ed. 469, 73 S. Ct. 397 ..... 11, 18

Brown v. *Mississippi*, 297 U.S. 278, 80 L. Ed. 682, 56 S. Ct. 461 11

Chambers v. *Florida*, 209 U.S. 227, 84 L. Ed. 716, 60 S. Ct. 472 ..... 11, 12

Cicenia v. *LaGay*, 357 U.S. 504, 2 L. Ed. 2nd 1523, 78 S. Ct. 1297 20

Crooker v. *United States*, 357 U.S. 433, 2 L. Ed. 2nd 1448, 78 S. Ct. 1287 ..... 19, 20

Fikes v. *Alabama*, 325 U.S. 191, 1 L. Ed. 2nd 246, 77 S. Ct. 281 ..... 12, 15

Haley v. *Ohio*, 332 U.S. 596, 92 L. Ed. 224, 68 S. Ct. 302 ..... 12, 16, 22

Lee v. *Mississippi*, 322 U.S. 742, 92 L. Ed. 330, 68 S. Ct. 300 18

Leyra v. *Denno*, 347 U.S. 556, 98 L. Ed. 948, 74 S. Ct. 716 ..... 12, 17

Malinski v. *New York*, 324 U.S. 401, 89 L. Ed. 1029, 65 S. Ct. 781 ..... 18, 21

Moore v. *Michigan*, 355 U.S. 155, 2 L. Ed. 2nd 167, 78 S. Ct. 191 21

Page

Payne v. *Arkansas*, 356 U.S. 560, 2 L. Ed. 2nd 295, 78 S. Ct. 844 ..... 11, 12, 17
People v. *Atchley*, 53 Cal. 2nd 160, 246 P. 2nd 764 18
Rochin v. *California*, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205 18
Sampedro v. *Puerto Rico*, 281 Fed. 2nd 888 ..... 13, 18
Spano v. *New York*, 360 U.S. 315, 3 L. Ed. 2nd 1265, 79 S. Ct. 1202 ..... 12, 17
Stein v. *New York*, 346 U.S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077 13
United States v. *Murphy* (2nd Cir.), 222 Fed. 2nd 698, cert. den. 350 U.S. 896 13
Wade v. *Jackson* (2nd Cir.), 256 Fed. 2nd 7, cert. den. 78 S. Ct. 1152 12
Watts v. *Indiana*, 338 U.S. 49, 93 L. Ed. 1801, 69 S. Ct. 1347 ..... 11, 12

CONSTITUTION AND STATUTES:

Constitution of the United States, Fourteenth Amendment 2, 4, 17, 18, 22
Constitution of California, Article 1, section 13 ..... 2, 19
California Penal Code, section 189 2
California Penal Code, section 190 ..... 3, 21
California Penal Code, section 190.1 ..... 3, 21

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Reference to Reported Opinions

No opinion was rendered by the trial court.

The opinion of the Supreme Court of the State of California is officially reported in *People* v. *Atchley,* 53 Cal. 2nd 160, 246 P. 2nd 764.

Jurisdictional Statement

1. The date of the judgment under review and the time of its entry is December 1, 1959. (*People* v. *Atchley,* 53 Cal. 2nd 160, 246 P. 2nd 764; R. 560.)

2. A petition for rehearing duly filed was denied on December 30, 1959 (R. 575).

3. Upon petition, Mr. Justice Douglas extended the time for filing petition for a writ of certiorari to April 28, 1960 (R. 575).

4. Petition for certiorari was filed April 26, 1960, and granted May 23, 1960 (R. 576).

5. Jurisdiction is conferred upon the Court to review the judgment in question by way of certiorari by the provisions of 28 USC 1257(3) and 2101 (d), and Rule 22 (1) of the Court.

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XIV, section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the State of California, Article I, section 13:

> "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel . . . "

California Penal Code, section 189:

> "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate

arson, rape, robbery, burglary, mayhem, or any act punishable under section 288, is murder of the first degree; and all other kinds of murders are of the second degree."

California Penal Code, section 190:

"Every person guilty of murder in the first degree shall suffer death, or confinement in the State prison for life, at the discretion of the court or jury trying the same, and the matter of punishment shall be determined as provided in section 190.1, and every person guilty of murder in the second degree is punishable by imprisonment in the State prison from five years to life."

California Penal Code, section 190.1:

"The guilt or innocence of every person charged with an offense for which the penalty is the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, and has been found sane on any plea of not guilty by reason of insanity, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceeding on the issue of penalty, or the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented, and the penalty fixed shall be expressly stated in the verdict. The death penalty shall not be imposed, however, upon any person who was under the age of 18 years at the time of the commission of the crime. The burden

of proof as to the age of said person shall be upon the defendant.

"If the defendant was convicted by a court sitting without a jury, the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury, unless a jury is waived. If the defendant was convicted by a jury, the trier of fact shall be the same jury, unless, for good cause shown, the court discharges that jury, in which case a new jury shall be drawn to determine the issue of penalty.

"In any case in which defendant has been found guilty by a jury, and the same or another jury trying the issue of penalty is unable to reach a unanimous verdict on the issue of penalty, the court shall dismiss the jury and either impose the punishment for life in lieu of ordering a new trial on the issue of penalty, or order a new jury impaneled to try the cause of penalty, but the issue of guilt shall not be retried by such jury."

Questions Presented for Review

1. Whether the Constitutional requirements of Due Process under the Fourteenth Amendment are fulfilled where the only suspect in a homicide case, having but a third grade education and unable to read or write other than to sign his name, in a state of shock, is held and questioned over a period of 48 hours, with little or no sleep, at which point a confession is not only extracted, but tape-recorded, by one who defendant thinks is acting as his trusted business advisor and friend but is, in fact, acting at the instigation of law enforcement officers.

2. Whether due process has been accorded and the defendant granted his right to counsel in a meaningful way

where, in addition to the facts recited in paragraph 1, above, such confession was secured at a time when counsel was denied defendant, despite his repeated requests therefor.

Statement of the Case

At approximately 3:07 a.m. on the morning of August 3, 1958, a deputy sheriff found the body of petitioner's wife in the yard of her home at Gridley, California (R. 88-89). Slightly less than an hour later, officers went to the home of petitioner at Palermo and took him into custody (R. 400-401).

To place the case in its proper perspective, petitioner's education, experience and background must be considered. Veron Atchley, commonly called Jack (R. 355) was born in Cleveland, in the mountain country of Tennessee (R. 351, 352, 355) of a farm family of 12 children (R. 356). He was 42 years old at the time of the trial (R. 352, 355). Going to school for three or four months a year, he managed to complete the third grade, but he has never learned to read or write, excepting that he can sign his name (R. 358).

Like many others, Jack Atchley was drawn to the west coast and came to California in 1943 (R. 393). He worked first irrigating in Southern California (R. 359); moving northward, he was employed in a Modesto cannery (R. 360) and then as a welder in the San Francisco ship yards (R. 360). Arriving in Butte County, he operated a bar in the small town of Palermo for two months (R. 365) and then moved on into the used car business (R. 289, 365, 366, 393), which he continued until the end of 1957 (R. 395). In the last year of this venture, the gross volume of business which went across his books was about $19,000, but Atchley was unable to estimate how much of this constituted his net profit (R. 307). After giving up the used car business, he

went to work thinning peaches (R. 297). In any event, he had enjoyed at least a modest success and had previously made a down payment of $600 on the purchase of two lots (R. 363). In his business dealings, he depended upon others to read the necessary documents to him (R. 359).

The instant conviction aside, Jack Atchley has virtually no criminal record. Except for two or three charges of disturbing the peace when he was a lad in his teens in Tennessee, his only conviction was for drunk driving, the penalty being a $250.00 fine (R. 357-358).

Finding this suspect at the pre-dawn hour, the arresting officers talked with him and defendant told them, falsely, that he had not been to Gridley and did not own a .22 automatic gun (R. 401-402). At the trial, he was unable to recall what other statements he had made at that time, and it does not appear from the record that the arresting officers testified.

Some two hours later, at approximately 6:00 a.m. August 3rd, petitioner was questioned in the interrogation room at the sheriff's office by the Sheriff's Chief Investigator, Walter S. Anderson (R. 149-150). In response to questions put to him Atchley then stated, in substance, that he had not been in Gridley on the previous night, that he had never owned a .22 pistol but that his wife had and had disposed of it, that his wife's former husband, one Jones, might have killed her, and that he had gone to bed about 12:30 the night before (R. 150-151).

The next officer to question the suspect was Herbert E. Lazere, employed by the State Department of Justice, who began his interrogation at about 11:30 p.m. on August 3rd (R. 121). Atchley told him that he had visited two or three taverns on the previous night and retired about midnight; that he did not presently own a .22, but earlier had had a .22 Luger which he sold to his wife who, in turn, had

disposed of it. Again he said that Braxton Jones, the former husband, might be responsible for the homicide (R. 122-124). He admitted having threatened his wife at an earlier date (R. 125). This questioning continued on through the night until about 5:00 a.m. of August 4th (R. 129).

Defendant had not slept all day Saturday, August 2nd, nor that night, nor all day Sunday or Sunday night, August 3rd (R. 382). During all of this time, he was in a state of shock and upset to such a degree that he couldn't realize what he was saying (R. 412-413), having been up for 48 hours (R. 415). While he was not denied an opportunity for sleeping, the accommodations were such that he could not do so (R. 418-419).

Lazere, accompanied by the Sheriff and the Chief of Police, resumed his interrogation at about noon on August 4th (R. 127). Before this session, although the times do not appear with certainty, defendant had, eight or ten times, asked for an attorney (R. 382, 436). Shortly before the interview took place, a gun and holster had been found (R. 173-174, 169-170) and they were shown to the defendant, who then admitted that he had been in Gridley and that his wife had been killed in a struggle (R. 130-131). Defendant further admitted he had gone to his wife's house to look for her, suspecting she was out with some other man (R. 131); that he did not park his car in front of the house, and that he had spent some little time in a shed at the rear of the property (R. 131). Atchley stated that when his wife arrived she had the gun in her hand and pointed it at him, and that it went off in the ensuing struggle (R. 132).

About 6:00 p.m. on August 4th, Roy J. Travers received a telephone request to visit the defendant next day at the jail. Travers complied and saw defendant about 10:00 a.m.

(R. 224). Travers, an insurance agent (R. 224), had been a friend of defendant's for about a year and had done business with him (R. 240). Defendant had called upon him for advice concerning a bond in connection with his business (R. 521), a life insurance policy (R. 524), and an automobile policy (R. 526). What defendant did not know was that Travers had previously been a deputy sheriff in the State of Nevada for three and a half years, two years of which had been in investigating homicides (R. 246-247).

Travers and Atchley discussed the life insurance of the deceased (R. 230); the other details of this first conversation do not appear, except that it was stated to be substantially the same as their second conversation (R. 232), which will be discussed presently.

When Travers and Atchley finished their talk, a deputy sheriff approached Travers as he was leaving and suggested that he return for another interview. The deputy also asked whether Travers would mind if the interview were tape recorded. Travers acceded to both requests (R. 234) and about noon (R. 224) went back into the interrogation room. Now Travers took the initiative and asked defendant questions about the shooting (R. 232, 236). At the trial, Travers admitted that he used the same pattern in questioning Atchley as he had used when a deputy sheriff working on homicides (R. 247). He assured defendant that he would not write down anything defendant told him, that he did not want anything on paper (R. 195). In order to elucidate details of the shooting, Travers told Atchley that he had to know because he had to write it all out for the company (R. 199). The record is void of any suggestion that he cautioned Atchley that the statements would, or could, be used against him.

Atchley related to Travers that he had been standing at the corner of the house; when his wife arrived, he stepped

around the corner and "right into her face" (R. 195); that she saw the gun in his belt and made a lunge for it and it discharged (R. 196); he stated he did not have the gun the first time he went to his wife's home and went back for it (R. 196), but he denied any intention to kill her (R. 197). Atchley further said he had gone to Gridley about 2:00 a.m. and waited about 25 minutes for his wife (R. 199). The statement is replete with coarse and profane language (R. 194-201).

On August 7th, Officer Anderson and another officer drove defendant to the mortuary to pay his last respects to his wife, leaving the sheriff's office at about 12:20 p.m. Atchley told them that he had gone to Gridley armed with a .22 automatic, that he parked his car and stood under a walnut tree for five to fifteen minutes waiting for his wife, but that he did not go into the shed (R. 152-154). He also mentioned his wife's arrival, her reaching for the gun and being shot in a struggle over the weapon (R. 157).

At the trial, on direct examination, defendant related his activities earlier in the evening (R. 374-375) and then testified that on arriving at his wife's home he went to the little shed to relieve himself, then walked toward the front of the house, then to the back, then once again to the front, whereupon his wife arrived (R. 377). She grabbed for the gun and was shot in scuffling over it (R. 379). He testified that he did not intend to shoot his wife when he went looking for her (R. 381).

The tape recording of the conversation between Atchley and Travers was played to the jury and admitted in evidence (R. 237-238).

In his opening argument to the jury, the prosecutor stressed that defendant could be found guilty of first degree murder, without deliberation or premeditation, if the killing were done by lying in wait (R. 533, 534, 538, 539, 540,

542, 544, 545-546). The Court also instructed fully on lying in wait (R. 32, 34). Apparently the jurors did not clearly understand the original instructions distinguishing first- and second-degree murder, for they returned for further enlightenment on the question (R. 555-558).

The verdict found defendant "guilty of the crime of murder as charged in the information" and the degree was fixed as first (R. 4).

Under California law (P.C. 190, 190.1) a separate trial was had to determine the punishment to be inflicted; and there was received in evidence, on the State's offer, all of the evidence theretofore admitted (R. 559). On December 17th the same jury decreed the death penalty (R. 59).

Petitioner has not burdened this discussion with any of the facts leading up to the killing, or the prior threats and assaults made by the deceased upon the petitioner, nor, indeed, the actual facts of the homicide, for these matters are not germane to the constitutional issues and related factual questions now before the Court.

ARGUMENT

A.

The Finding by the State Court That the Confession Was Voluntary Is Not Binding Here, and This Court Must Make Its Own Determination From the Uncontroverted Facts in the Record.

The rule is now so firmly established as to be beyond question that when the claim is that the confession is the product of coercion, this Court must make its own examination of the record to determine whether that claim is meritorious; and the performance of this duty cannot be fore-

closed by the finding of a court, or the determination of a jury, or both. (*Payne* v. *Arkansas*, 356 U.S. 560, 2 L. Ed. 2nd 975, 78 S. Ct. 844; *Chambers* v. *Florida*, 84 L. Ed. 716, 209 U.S. 227, 60 S. Ct. 472; *Brown* v. *Allen*, 344 U.S. 443, 97 L. Ed. 469, 73 S. Ct. 397.) As said in *Watts* v. *Indiana*, 338 U.S. 49, 93 L. Ed. 1801, 69 S. Ct. 1347:

> "...'(I)ssue of fact' is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper application, are issues for this Court's adjudication...."

This being such a case, it remains now to examine the uncontroverted happenings to see whether they measure up to the Constitutional requirements.

B.

Petitioner Was Convicted in Contravention of His Right to Due Process of Law by the Use of a Confession Which Was Not the Product of His Free Will.

Through juridical history, and particularly in the Anglo-Saxon countries, the use of confessions extorted by torturing the accused have been abhorred. The rule was crystallized by this Court in a particularly shocking case of physical brutality in 1936, when, in *Brown* v. *Mississippi*, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682, it was held that a conviction in a State court based upon a confession so secured amounted to a denial of due process. Through the years, the Court has been called upon to consider cases where, although physical violence is not alleged, the confession is the end product of psychological coercion. Clearly the law

now is that such coercion so offends the civilized standards of this country as to taint the confession it produces equally as does physical violence. Varying factual situations have been held to show so great an overcoming of the will of the accused that due process has been denied. (*Chambers* v. *Florida, supra; Wade* v. *Jackson* (2nd Cir.), 256 Fed. 2nd 7, cert. den. 78 S. Ct. 1152; *Ashcraft* v. *Tennessee*, 322 U.S. 143, 88 L. Ed. 1193, 64 S. Ct. 921; *Haley* v. *Ohio*, 332 U.S. 596, 92 L. Ed. 224, 68 S. Ct. 302; *Fikes* v. *Alabama*, 325 U.S. 191, 1 L. Ed. 2nd 246, 77 S. Ct. 281; *Watts* v. *Indiana, supra; Payne* v. *Arkansas, supra; Spano* v. *New York*, 360 U.S. 315, 3 L. Ed. 2nd 1265, 79 S. Ct. 1202; *Leyra* v. *Denno*, 347 U.S. 556, 98 L. Ed. 948, 74 S. Ct. 716.)

In the nature of things, no all-inclusive rule can be laid down, settling for all time what is, and what is not, sufficient to overcome the will of every man charged with crime. By the same token, no one factor by itself can be found which will render a confession involuntary. Wisely, the standard which has been set is based upon the total facts in each particular case. (*Fikes* v. *Alabama, supra; Payne* v. *Arkansas, supra.*) The totality of the facts here permits of no conclusion other than that petitioner's confession was so improperly obtained as to vitiate his conviction. Let us consider the circumstances, seriatim:

1. The record does not disclose whether or not petitioner was arrested upon a warrant.

2. Petitioner was in custody, and had been for some time, prior to the taking of the confession. It is not contended that this fact alone is conclusive; but incarceration with the unusual tension which it produces, must be taken into account along with the other factors as bearing upon the mental state of the accused. (*Ashcraft* v. *Tennessee, supra.*) Considering the type of man petitioner is (see *infra*, next

paragraph) it cannot be doubted that being incarcerated by the authorities would have a marked effect.

3. Petitioner was illiterate, with a meager third grade education. His only serious prior brush with the law was a traffic offense, involving a $250.00 fine. The record leaves his financial success in doubt, for it is common knowledge that a $19,000 gross used car business involves a profit of perhaps one-fourth of that figure. Yet even a successful business man may be subject to psychological coercion. (*Sampedro* v. *Puerto Rico*, 281 Fed. 2nd 888.) Regardless of petitioner's success in that business, the record shows him to be not a business tycoon but a humble, menial laborer. Here is a major distinction between this case and *Stein* v. *New York*, 346 U.S. 156, 97 L. Ed. 1522, 73 S. Ct. 1077, where the defendants were hardened criminals, experienced in the ways of crime and its detection and fully cognizant of their rights.

4. Petitioner was in a state of shock and upset. He was arrested at four o'clock on a Sunday morning, not having slept the previous day or night. Two hours later he was questioned, and then again at 11:30 p.m. on Sunday night, continuing until 5:00 a.m. of Monday morning. Although the assailed confession was not made until the following day, the record does not compel the conclusion that petitioner had adequate sleep to restore him in the meantime. While it is not contended that the authorities actively prevented petitioner from sleeping, the accommodations afforded him were such as to make sleep impossible. No claim is made that he should have been given luxurious quarters—the point is the effect which the surroundings and the lack of sleep had upon his mental state and will power. (See *United States* v. *Murphy* (2nd Cir.), 222 Fed. 2nd 698, cert. den. 350 U.S. 896; and cf. *Sampedro* v. *Puerto Rico*, *supra*.)

5. Petitioner was cut off from his friends and denied his right to counsel. The latter point will be more fully developed in argument under "E", *infra*. But the lack of counsel remains a factor to be considered in determining whether the confession was a voluntary one. For all the record shows, the only person whom petitioner was permitted to see during the period in question was Roy J. Travers, the man who at the suggestion of the police, in the guise of a friend of petitioner, elicited the questioned confession.

6. Petitioner was overreached and, in effect, overborne, and the tape-recorded confession was the result. Petitioner looked upon Travers as a friend and counselor; when he asked Travers to see him, the only fair inference is that he wished to discuss problems relative to his wife's insurance. It is unnecessary to consider what the result would be if there had been but one conversation between the men which the State put before the jury through Travers' testimony. That is not the case. The State was not content to rest there, but asked Travers to talk to Atchley again; and, without his knowledge, defendant's words were tape recorded.

Nowhere does it appear that Travers told petitioner that he did not have to discuss the matter and that he had a right to remain silent. Granted, no such warning against self-incrimination would have been required of Travers, the insurance agent. But when Travers becomes the *de facto* agent of the police, knowing that the conversation is being recorded, standards of decency and fairness make it incumbent upon him as to caution defendant as to his privilege against self-incrimination. What does Travers in fact do? He tells the petitioner that he must have all of the facts for the insurance company; he insinuates, by saying he wants nothing in writing, that this is a conversation con-

fidential between the two men; he draws upon his previous experience in law enforcement investigation to draw out damning statements from the defendant's lips. It is no answer to say that petitioner had been given the traditional warning by the *de jure* officers, for he knew not that Travers was (in effect) one of them. Travers did not don a badge and a uniform; but, at the request of the officers, he deluded petitioner if, indeed, he did not perpetrate an actual fraud upon him. Petitioner had, prior to his conversation with Travers, resisted giving any really incriminating statements to the police; considering his limited education and his lack of criminal experience, it is not unreasonable to suppose he felt himself at their mercy and was, as a result, wary of them. Travers, his friend, appeared as a familiar advisor, a shield, someone to lean upon; petitioner had no reason to suspect a secret betrayal. Such subtle, invidious methods were not unknown during the Inquisition; they are not unknown as a form of brainwashing in totalitarian states today. But they are inimical to the American concept of justice and to the requirements of due process. (*Fikes* v. *Alabama, supra.*) And such methods are just as effective to break down the resistance and overcome the free will of an accused as are others heretofore condemned by this Court.

7. The methods of the State in securing the confession and in using it at the trial raise a suspicion that the aim was to secure a conviction at all costs. Petitioner at first denied any connection with the homicide; after the gun and the holster were found he admitted being at the scene but claimed that it was his wife, not he, who came armed; and he did not then make what could be construed as a confession. Obviously the authorities were not satisfied. Just as obviously they hoped to obtain—and did obtain—an incriminating statement by using Travers as they did. What petitioner had previously told them, or a showing of

the falsity of his statements, might be some indications of guilt; his recorded conversation with Travers certainly made the work of the State easier. Other questions come to mind from the State's insistence upon playing the recording to the jury, offering them not only defendant's self-ineriminating statements in his own voice, but his profane language as well. Why? Assuming, *arguendo*, although not conceding, that the conversation was admissible, they had Travers who could have testified to it. They also had Officer Anderson, to whom later and similar statements were made. Clearly, after having obtained the confession by unconstitutional means, the State felt that it could not secure a conviction without the use of this tainted evidence, without regard to petitioner's right to due process. No problem of the protection of society will arise by rejecting the use of this confession; to bar the methods here present will not prevent the police from a fair questioning of those suspected of crime, but will estop them only from unfair questioning. The methods of criminal procedure employed by a State cannot include methods which are in conflict with constitutional guarantees. (Mr. Justice Frankfurter, concurring in *Haley* v. *Ohio, supra.*)

A juror, like any human being, is prone to give more weight to a tape-recorded conversation than to a narration of the same conversation by one of the participants, or to the exposition of some other conversations. No one can tell what weight this recording had upon the jury. They might have concluded that malice aforethought had not been shown but that the recording established a homicide by lying in wait. They might have thought it proved a case of first degree murder, ruling out second; clearly, since they returned for additional instructions, they entertained some doubt upon the question. Neither can we speculate the weight, consciously or subconsciously, given to the recording when the jury assessed the penalty at death, rather

than life imprisonment. For this reason, such a coerced confession vitiates the judgment. (*Payne* v. *Arkansas, supra.*) While it is not incumbent upon petitioner to show prejudice as a result of the use of the confession, in passing we may paraphrase what was said in *Bram* v. *United States*, 168 U.S. 532, 42 L. Ed. 568, 18 S. Ct. 183, and reflect that the State, having gone to the lengths which it did to secure the recorded statement, cannot now take the inconsistent position that it had no impact upon the jury.

It is submitted that this case is closely akin to *Leyra* v. *Denno, supra*, and *Spano* v. *New York, supra*. Here, petitioner's will was overborne by official pressure, by fatigue, by sympathy falsely manifested by one whom he thinks is helping him. Here, too, we have an illiterate defendant, from whom the police are seeking a statement with which to convict him. The totality of the circumstances in this case compel a finding that the confession was coerced, that it was not an expression of free choice, and that its use before the jury denied to petitioner the Due Process of Law guaranteed him by the Fourteenth Amendment.

C.

Whether the Statements Be a Confession or Mere Admission, Defendant's Constitutional Rights Have Been Violated and the Conviction Cannot Stand.

Previously, the California courts have drawn a line of demarcation between admissions and confessions. But even if this be considered as merely an evidentiary rule and hence of state concern, no fine, technical distinction between a confession and admissions intrudes in this case. By its ruling, in what is now the law of the case, the Supreme Court of California has held that the rule of exclusion is the same as to both types of inculpatory state-

ments. (*People* v. *Atchley*, 53 Cal. 2nd 160, 246 P. 2nd 764 (R. 560, 565-566); and see also 48 Cal. Law Rev. 697.)

D.

Due Process Is Denied When a Conviction Is Secured by Means of an Involuntary Confession Regardless of Its Truth or Falsity and Regardless of Other Corroborative Testimony.

Once it has been established that a confession obtained in violation of Due Process standards has been used as a part of the evidence to convict, it becomes immaterial that there may have been sufficient other evidence to sustain the conviction. (*Malinski* v. *New York*, 324 U.S. 401, 89 L. Ed. 1029, 65 S. Ct. 781; *Lee* v. *Mississippi*, 322 U.S. 742, 92 L. Ed. 330, 68 S. Ct. 300; *Brown* v. *Allen, supra.*) Indeed, the Fourteenth Amendment operates to prohibit the use of such statements, even though the matters therein contained may be independently established as true. (*Rochin* v. *California*, 342 U.S. 165, 96 L. Ed. 183, 72 S. Ct. 205.) Here, as in *Malinski*, which is much like the instant case in pertinent areas, the judgment should be set aside as violative of substantive due process. So it is no answer for the State to argue, as probably will be done, that petitioner's subsequent statement to Officer Anderson or his trial testimony should operate to cancel out the violation of petitioner's constitutional rights. For this reason we do not argue at length the proposition that, considering the circumstances of this case and the kind of a person petitioner has been shown to be, the initial fraud perpetrated upon him carry over and taint the later statements. It has been judicially noticed that there is no scientific basis for any presumption that psychological coercion wears off more quickly than physical violence. (*Sampedro* v. *Puerto Rico, supra.*) The

rule which governs here is as stated by Mr. Chief Justice Warren in the recent decision in *Blackburn* v. *Alabama*, 4 L. Ed. 2nd 242, 361 U.S. 199, 80 S. Ct. 274:

> ". . . (T)he Fourteenth Amendment is grievously breached when an involuntary confession is obtained by state officers and introduced into evidence in a criminal prosecution which culminates in a conviction. . . . (C)oercion can be mental as well as physical, and the blood of the accused is not the only hallmark of an unconstitutional inquisition. . . . (T)here are considerations which transcend the questions of guilt or innocence. . . . Where the involuntariness of a confession is conclusively demonstrated at any stage of a trial, the defendant is deprived of due process by entry of judgment without exclusion of the confession."

E.

Defendant's Constitutional Rights Were Further Violated Where, in Addition to the Use of a Coerced Confession, His Requests for Counsel Have Been Denied.

Recognizing that this court has not spoken with one voice as to the effect under the Federal Constitution of a denial of counsel in a state court proceeding (*Crooker* v. *United States*, 357 U.S. 433, 2 L. Ed. 2nd 1448, 78 S. Ct. 1287), we respectfully urge that the problem be re-examined and with particular consideration of Article 1, section 13, of the Constitution of the State of California, which contains a guaranty of counsel. The State has adopted the guaranty and protection extended by the Constitution of the United States to criminal trials in federal courts. Having done so, it is bound to assume the same standard. Stated differently, California was, at least within limits, free to provide for the right of counsel or not; having done

so, it is bound by the Constitution of the United States to make the right which it has granted a meaningful one. And, as noted in the dissent in *Crooker, supra,* the need for counsel is as great at pre-trial as at any time during the proceedings. Whatever the view of the majority as to whether or not a denial of counsel in a state court is, *per se,* sufficient to vitiate a trial and conviction, they have recognized that it is a pertinent circumstance to be weighed in determining whether a conviction is the product of fundamental unfairness. (*Cicenia* v. *LaGay,* 357 U.S. 504, 2 L. Ed. 2nd 1523, 78 S. Ct. 1297.)

Certain factors are relevant in the instant case as bearing upon the effect of the denial of petitioner's requests for an attorney. For one thing, this is not the case of failure to advise a defendant of his right to counsel; nor does it involve an attempt by an attorney, unsolicited by the defendant, to see him. It is submitted this is a far more grievous case; defendant wanted an attorney and eight or ten times made his request known. It was ignored. He did all that he could do. He asked to see Roy Travers, an insurance agent. This request was granted and, as has been shown, Travers became, in effect, a police agent who secured a confession.

The authorities here were not merely trying to solve an unsolved crime and interrogating one of a number of suspects. The record makes it clear that they felt confident that they had the guilty man and that the sole purpose of the questioning was to secure a confession. It would not be unfair to infer from the record that they felt that Travers, because of his relationship with petitioner, would be more effective than they themselves had been. Defendant had previously asked for an attorney. Perhaps we can speculate that, had he been granted the right to consult with legal counsel, his need to see Travers would never

have arisen; surely his attorney could have taken care of the insurance problems. Surely, too, an attorney worth his salt would have advised petitioner to make no statements.

In addition to the damning effect which the tape-recorded statements had (and which might well never have come about had petitioner had counsel), those statements bear directly, to petitioner's prejudice, upon the degree of the crime. Here, as in *Moore* v. *Michigan*, 355 U.S. 155, 2 L. Ed. 2nd 167, 78 S. Ct. 191, the aid of counsel might have done much to establish a lesser degree of the substantive crime or to have mitigated the sentence. Here, as in *Moore*, we have a defendant of limited education and mental capacity deprived of his right to counsel. Here, as well, under California law (P.C. 190, 190.1) we have, in effect, two trials to the same jury, the first to determine guilt or innocence and the degree of the crime, the second to determine the penalty. Here the jurors not only had in mind the statements of petitioner when they found him guilty of first degree murder; his own words were still ringing in their ears when they meted out the severest punishment known to the law. We cannot and need not speculate the effect the coerced confession played. It tainted not one, but two, trials. It was indelibly written on the minds of the jurors, not merely through the testimony of a witness, but by the playing of a tape recording—the only evidence so produced at the trial.

In *Malinski, supra*, as here, the defendant was not allowed to see a lawyer, despite his request to do so, and was allowed to see no friends except the one to whom he confessed. In considering whether or not in this case the State has so violated its own constitutional requirements as to constitute a denial of a federal right, it is pertinent to note that in virtually every case where a confession has been so

coerced as to be a denial of Due Process, there has been an absence of counsel, frequently a denial of a request for counsel. It seems clear that the states, and not California alone, are especially prone to deny counsel to a man in such a case. And, as noted in another connection, to enforce this right which is guaranteed to petitioner here by the Constitution of his State, will not hinder the police in the detection of crime by fair methods but it will deter them from unfair means. It will be one more step toward insuring that the states have the freest possible scope in their methods of criminal procedure, and that they will still operate within constitutional limitations (*Haley* v. *Ohio*, *supra*) for the protection not only of this lowly petitioner, but for all citizens and for the preservation of the Constitution.

Conclusion

The introduction and use of petitioner's confession to Travers to convict him and the denial of his right to counsel transgressed the imperatives of fundamental justice as expressed in the Fourteenth Amendment, and the judgment should be reversed.

Dated, March 13, 1961.

Respectfully submitted,

ROSALIE S. ASHER
Attorney for Petitioner

J. R. KING, JR.
Of Counsel